BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA A. LEWIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,029
M & M MOULDERS	)	
Respondent	)	
AND	)	
	)	
FIRST LIBERTY INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Claimant appealed the January 4, 2008, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on April 2, 2008.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Elizabeth Reid Dotson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes a written Stipulation of Parties Regarding Average Weekly Wage filed by the parties with the Division of Workers Compensation on May 29, 2007.

ISSUES

Claimant initiated this claim alleging a November 5, 2004, accident and injuries to her back, both legs, neck, left arm, left shoulder and "all other parts of the body affected."[1]

[1] Form E-1, filed with the Division of Workers Compensation on April 4, 2005.

In the January 4, 2008, Award, Judge Klein found claimant sustained an eight percent whole person functional impairment for a lower back injury. Moreover, the Judge found claimant voluntarily left an accommodated position (in other words, claimant did not make a good faith effort to retain her employment). Therefore, the Judge awarded claimant permanent partial disability benefits based upon her eight percent whole person functional impairment rating.

Claimant contends Judge Klein erred by limiting her permanent disability benefits to her functional impairment rating. Claimant first argues it was error to apply a good faith test in analyzing claimant's post-injury wage loss as the Kansas Supreme Court in both *Casco*[2] and *Graham*[3] held that the Workers Compensation Act should be applied as written and "the good faith test is not with[in] the plain and unambiguous language of K.S.A. 44-510e and is an impermissible expansion of the statute."[4] In the alternative, should the Board determine the good faith test is applicable, claimant contends she demonstrated good faith but respondent's conduct was tantamount to bad faith. In summary, claimant requests the Board to find she sustained a 15 percent whole person functional impairment and a 71.5 percent work disability,[5] which represents a 100 percent wage loss and a 43 percent task loss.

Conversely, respondent contends the Award should be either affirmed or modified to find a functional impairment less than the eight percent determined by Judge Klein. Respondent contends claimant's request for a work disability should be denied because claimant voluntarily terminated her employment with respondent.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability under K.S.A. 44-510e.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

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[2] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[3] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[4] Claimant's Brief at 2 (filed Feb. 21, 2008).

[5] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

Respondent manufactures cabinets. Claimant began working for respondent in April 2004. Several months later, in early November 2004, claimant began experiencing pain in her lower back and down into her right leg while working as a stacker, a job in which claimant would transfer pieces of wood from a conveyor belt to a pallet. The parties stipulated claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

After reporting her symptoms to respondent's office manager, Jean Lardy, respondent sent claimant for treatment by the company doctor, Dr. Brett Donahey. According to claimant, the doctor saw her twice but did nothing for her other than prescribing medications and restricting her to light duty for approximately a week.[6]

Dr. Donahey saw claimant on November 12, 2004, and diagnosed her as having somatic dysfunction in the upper back and low back strain. He restricted claimant from lifting over 20 pounds and directed her to return to his office in one week. For some reason, claimant did not return to the doctor for that follow-up visit. As it happened, claimant did not return to Dr. Donahey until after she terminated her employment with respondent.

While claimant was under Dr. Donahey's restriction, respondent had claimant sweep. Claimant then returned to stacking. Later, at her request, respondent assigned claimant to the finish line where she sprayed wooden panels, which claimant described as easier work. When claimant requested the transfer she did not tell the plant manager, Rodney Fleming, that stacking was bothering her back.[7]

Claimant believes she worked on the finish line for approximately one month before leaving respondent's employment. After moving to that job, claimant did not request respondent to either change her job or otherwise accommodate her low back and right leg symptoms. And respondent did not offer. Instead, on February 7, 2005, claimant gave Mr. Fleming her resignation letter in which she wrote she would not be returning to work as her neck and back hurt, which was affecting her "att[e]ndance and alot *[sic]* of other things."[8] According to claimant, her back hurt too much to continue working. The last day claimant actually worked for respondent was February 5, 2005.

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[6] P.H. Trans. (April 5, 2006) at 8, 9.

[7] *Id.* at 11.

[8] *Id.*, Resp. Ex. 2.

Claimant first testified at the April 2006 preliminary hearing that when she submitted her resignation letter she did not request to return to the doctor.[9] But at the same hearing she later testified *she did ask* to see a doctor but not necessarily respondent's company doctor.[10] And later, at the April 2007 regular hearing, claimant testified she asked to return to the company doctor.[11]

On February 11, 2005, claimant completed an exit interview with Ms. Lardy. During the interview claimant advised she was leaving respondent's employment because her neck and back were hurting. She also told Ms. Lardy that one of the reasons she was quitting was because she was supposed to have been seeing a doctor but nobody had made her an appointment. Ms. Lardy had not been aware that claimant needed medical treatment and she told claimant that she could still see a doctor. Indeed, on February 15, 2005, claimant returned to Dr. Donahey for the second and final time. At that examination, the doctor determined claimant's back pain had returned to its baseline following an earlier back surgery. In his notes dated February 15, 2005, the doctor recorded:

> Patient later said pain has improved since off work. When asked about prior statement that pain has not improved since quit work, she changed the subject.
>
> My overall impression: She is back to her baseline pain that has progressively worsened since 2 years after back surgery in 1992. She is definitely not having any debilitating pain today. She moves around the room easily, vital signs are normal, & she just doesn't appear to be in pain.[12]

In short, Dr. Donahey concluded claimant had given him inconsistent information regarding the progression of her symptoms. The doctor concluded claimant's back pain was not work-related and, therefore, it should be treated by her personal physician (a position he offered to assume).

Claimant disputes Dr. Donahey's conclusions. First, she testified she did not have any problems with her back after her earlier back surgery until injuring her back while working for respondent.[13] According to claimant, she injured her back in 1987 while carrying change at a casino, underwent a fusion, and was given a 30-pound lifting

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[9] *Id.* at 20.

[10] *Id.* at 25.

[11] R.H. Trans. at 21.

[12] P.H. Trans. (April 5, 2006), Resp. Ex. 1.

[13] *Id.* at 17.

restriction.[14] Second, she testified Dr. Donahey's notes were erroneous as she never said her pain was worsening (which she noted was actually true),[15] never said she had improved since being off work, never said she had improved since the twisting incident at work, never said she had experienced sharp pain for years following her back surgery, and never changed the subject when the doctor asked her about being inconsistent.[16] She also contends the doctor's records are inaccurate as he never took her vital signs at the February 15, 2005, appointment.

At her attorney's request, claimant was next examined and evaluated by Dr. Edward J. Prostic, a board-certified orthopedic surgeon. The doctor first examined claimant on March 23, 2005. Claimant told Dr. Prostic that she underwent low back surgery in 1991 and that she had a good outcome with occasional ache and a feeling that she had limitations imposed by her back.[17] Claimant believed she had previously undergone a two-level fusion. But lumbar x-rays taken by Dr. Prostic indicated she had a one-level fusion at L5-S1.

Claimant told Dr. Prostic she had significant pain in her back (eight out of 10 on a 10-point scale) and intermittent pain radiating into both posterior calves. Based upon his evaluation, Dr. Prostic concluded claimant most likely injured her low back at the "L4-L5 motion segment."[18] Consequently, Dr. Prostic recommended conservative care and rated claimant as having an eight percent (which he later increased to 15 percent) whole person functional impairment under the AMA *Guides*.[19]

Again, at her attorney's request, claimant was next examined and evaluated by Dr. Brian K. Ellefsen. The doctor examined claimant on September 9, 2005, and recommended additional testing and treatment.[20] Dr. Ellefsen did not testify in this claim.

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[14] *Id.* at 16.

[15] *Id.* at 26.

[16] *Id.* at 27, 28.

[17] Prostic Depo. at 8.

[18] *Id.* at 13.

[19] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[20] Prostic Depo. at 15.

Claimant sought additional medical treatment. After an April 2006 preliminary hearing, Judge Klein ordered respondent to provide claimant the names of three physicians from which claimant would select an authorized physician. Claimant chose Dr. Pat D. Do, a board-certified orthopedic surgeon. The doctor met with claimant on July 6 and 13, 2006, and diagnosed an aggravation of her segmental motion segment (or stated another way, an aggravation of her preexisting fusion). The doctor ordered an MRI scan and lumbar x-rays, which failed to show any stenosis, nerve compression, instability, or other obvious surgical lesion.

Dr. Do initially did not provide an impairment rating for claimant as he was unable to find an anatomic reason for her symptoms and he initially did not believe her pain justified a rating under the AMA *Guides*. The doctor testified, in part:

> Q. (Ms. Dotson) And why is it that you gave her no permanent impairment as it relates to the work-related accident at M&M Moulders?
>
> A. (Dr. Do) Because even though she was having pain, in the Fourth Edition I don't think we can assess and give her pain, and because there is no instability or diagnostic studies that show instability or categories. I didn't see any obvious anatomic reasons to give her any permanent impairment from that.[21]

But at his deposition, Dr. Do testified he believed claimant had between a 10 and 20 percent whole person impairment under the DRE model of the AMA *Guides*[22] due to her earlier surgery and radicular complaints and that if someone believed claimant's complaints of pain, which he did, then claimant would have an additional five percent whole person impairment under the AMA *Guides*. The doctor explained:

> Q. (Mr. Phalen) The Guides don't, and we covered a variety of things that could have physiological change in her back that was causing her pain, the Guides don't address that, correct? For adding impairment for somebody.
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> A. (Dr. Do) Not for the pain, no.
>
> Q. But those are very real conditions that can actually warrant surgery; is that correct?
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> A. Yes.

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[21] Do Depo. at 12, 13.

[22] *Id.* at 30.

> Q. And is it because of that you could give her up to five percent additional impairment?
>
> A. Yes.
>
> Q. Okay.
>
> A. And because I believe she is in pain.[23]

Moreover, should claimant conclude her back symptoms are debilitating enough to risk revision surgery, Dr. Do indicated the next step would be to undergo a bone scan to help determine what may be generating her pain.

Finally, Dr. Do concluded claimant should have permanent work restrictions, which he was unable to apportion between her previous lumbar fusion and the injury she sustained working for respondent. In short, the doctor believed claimant should not bend at the waist much past 80 degrees, should limit continuous lifting to no more than 10 pounds, limit frequent lifting to 11 to 20 pounds, and limit occasional lifting to 21 to 50 pounds. The doctor, however, thought claimant could push and pull up to 25 pounds continuously, 26 to 50 pounds frequently, 51 to 75 pounds occasionally, and no pushing or pulling more than 76 pounds.[24]

On September 26, 2006, Dr. Prostic evaluated claimant for the second and final time. At that examination, claimant complained of constant pain in her low back and radiating pain into her right thigh to the right ankle. This time claimant displayed a more restrictive range of motion and a reduced ability to squat. She also complained of radicular symptoms and hypesthesia throughout the right leg that was non-anatomical. In short, Dr. Prostic found claimant's condition was worse, which he attributed to psychological decompensation, but that she did not have a provable neurologic deficit. Moreover, he increased her functional impairment rating from eight to 15 percent as measured by the range of motion model of the AMA *Guides*. Dr. Prostic testified, in part:

> Q. (Mr. Phalen) Doctor, I want to cover one issue with you for the benefit of the Administrative Law Judge. Your 15 percent, can you explain the relationship if any to your opinion that she has psychologically -- first of all, what do you mean by psychological decompensation?
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> A. (Dr. Prostic) Simplistically she has lost her ability to handle pain. She is most likely overly worried about her health, overly worried about injuring herself, and

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[23] *Id.* at 37.

[24] *Id.* at 13, 14.

> unable to do normal activities and normal exercises to rehabilitate her muscles. Because of that she has poor range of motion and very poor function.
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> Q. You're not saying that she's faking this injury, are you?
>
> A. I think she is not faking.[25]

Dr. Prostic believed claimant had a solid L5-S1 fusion and, therefore, her more recent injury was to a different area of her low back. Accordingly, the doctor found claimant's 15 percent whole person impairment was solely due to the injury she sustained working for respondent and that it was over and above any pre-existing impairment.[26]

Considering the medical evidence presented, the Board finds claimant sustained a five percent whole person functional impairment due to her November 2004 low back injury. That finding is supported by the opinion of Dr. Do, who appears to be in a more neutral position as he was selected by the claimant to provide medical treatment from a list compiled by respondent but not hired by either claimant or respondent for an expert opinion. Likewise, the Board concludes claimant should observe the work restrictions recommended by Dr. Do.

When the record closed, claimant was unemployed as she had not worked for any employer since leaving respondent's employment in February 2005.

CONCLUSIONS OF LAW

Claimant has sustained a low back injury, which is not included in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial disability benefits are to be determined under K.S.A. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is

[25] Prostic Depo. at 23, 24.

[26] *Id.* at 18, 19.

> engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant is correct that a literal reading of K.S.A. 44-510e indicates claimant is entitled to receive a permanent partial general disability based upon her wage loss and her task loss. But, unfortunately for claimant, the appellate courts have not followed the literal language of the statute. Instead, the courts have added additional benchmarks for injured workers to satisfy before they are eligible to receive permanent disability benefits in excess of the functional impairment rating. For example, *Foulk*[27] and *Copeland*[28] held that an injured worker must make a good faith effort to work or to find appropriate employment before the worker's actual post-injury wages may be used in the permanent partial general disability formula. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed for that formula.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[29]

Neither good faith effort nor imputing wages are mentioned in K.S.A. 44-510e or any other statute in the Workers Compensation Act.

In *Ramirez*[30], the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. Again, nowhere does the Workers Compensation Act provide that an incomplete or erroneous employment application is an affirmative defense to a work disability claim or that it may preclude an award of work disability. Indeed, the injured worker in *Ramirez* may have been surprised as the back injury that was not disclosed in the employment application was not related in any manner to the upper extremity injuries he later sustained. Moreover, before the 1993 legislative changes to the Act and the relative demise of the Workers Compensation Fund, an application that misrepresented or concealed facts or information was potential grounds for shifting liability to that Fund.

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[27] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[28] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[29] *Id.* at 320.

[30] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

In addition, the Kansas Court of Appeals in *Mahan*[31] held that when an employee failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at a similar wage rate precluded an award of work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[32]

Again, nowhere does the Act provide that failing to make a good faith effort to retain employment is a defense to a claim for a work disability. Conversely, the Kansas Court of Appeals in *Oliver*[33] held that neither K.S.A. 1998 Supp. 44-510e(a) nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*[34], the Kansas Court of Appeals held a worker was not required to accept an offer of employment from his or her employer and any such offer was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment. The *Rash* decision states, in part:

> Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. **The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer.** The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment. An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails in this effort, "the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert

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[31] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[32] *Id.* at 321.

[33] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[34] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

> testimony concerning the capacity to earn wages." *Copeland*, 24 Kan. App. 2d at 320.[35]

Moreover, the Kansas Supreme Court has recently sent two strong signals that the Workers Compensation Act should be applied as written. In *Graham*[36], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[37]

Moreover, in *Casco*[38], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[39]

Nevertheless, despite claimant's persuasive argument and the Kansas Supreme Court's recent mandates to follow the literal language of the Act, this Board cannot substitute its judgment for that of the appellate courts. Accordingly, the Board is compelled to follow the law set forth in the above-cited cases until they are modified or overturned by other appellate decisions.

Hence, before claimant is entitled to receive a work disability she must prove that she has made a good faith effort to retain her employment and find other employment.

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[35] *Id.* at 185 (emphasis added).

[36] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[37] *Id.* at Syl. ¶ 3.

[38] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[39] *Id.* at Syl. ¶ 6.

And the Board finds claimant has failed to prove she made a good faith effort to retain her employment with respondent. The Board is persuaded by the testimony of Mr. Fleming that claimant's job spraying panels was very light work, which would not violate the restrictions recommended by Dr. Do. The Board likewise finds that claimant did not make a good faith attempt to retain that job. Claimant now attempts to blame respondent for her failure to seek follow-up medical treatment after her first visit with Dr. Donahey. But that is disingenuous.

Moreover, the Board notes claimant is either a poor historian or that she deliberately misrepresented the facts. For example, in addition to the inconsistencies set forth in the findings above, claimant initially testified at her preliminary hearing that she had moved out of the state for about three months. But later at her regular hearing, claimant testified that she never moved out of state and never told anyone that she intended to move out of state.

Because claimant did not make a good faith effort to retain her employment with respondent, that wage is imputed to her for purposes of the permanent partial general disability formula. Thus, there is no wage loss and claimant's permanent partial disability is limited to her five percent whole person functional impairment rating.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[40] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the January 4, 2008, Award entered by Judge Klein.

Debra A. Lewis is granted compensation from M & M Moulders and its insurance carrier for a November 5, 2004, accident and resulting disability. For the period ending February 4, 2005, based upon an average weekly wage of $371.56, Ms. Lewis is entitled to receive 13 weeks of permanent partial general disability benefits at $247.72 per week, or $3,220.36.

For the period commencing February 5, 2005, based upon an average weekly wage of $381.15, Ms. Lewis is entitled to receive 7.75 weeks of permanent partial general disability benefits at $254.11 per week, or $1,969.35, for a five percent permanent partial

[40] K.S.A. 2007 Supp. 44-555c(k).

general disability, making a total award of $5,189.71, which is all due and owing less any amounts previously paid.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. **Before claimant's counsel may retain any fee in this matter, counsel must submit the written agreement to the Judge for approval as required by K.S.A. 44-536.** The order approving the written fee agreement is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Elizabeth Reid Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge